SUPREME COURT, U. S.

FILED

SEP 5 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1967

No. 570

TAYLOR JUSTICE and STELLA JUSTICE, - - - - - - Appellants,

versus

UNITED STATES OF AMERICA,
GLEN B. JOHNSON, Special Agent, Internal Revenue Service,
FIRST NATIONAL BANK OF PIKEVILLE, KENTUCKY,
CITIZENS BANK OF PIKEVILLE, KENTUCKY and
PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC., - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT.

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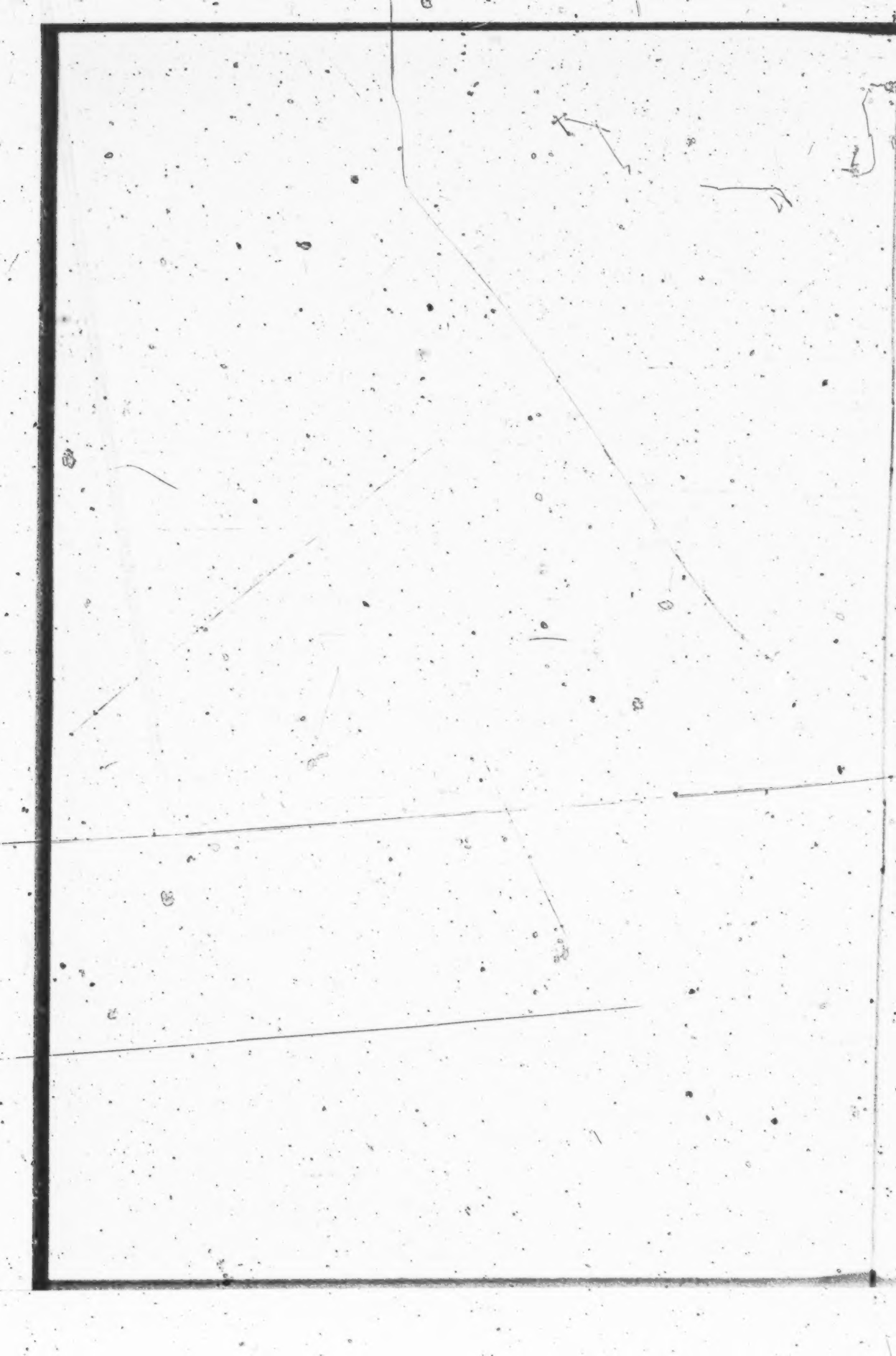

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. _____

TAYLOR JUSTICE and STELLA JUSTICE, *Appellants,*

v.

UNITED STATES OF AMERICA,
GLEN B. JOHNSON, Special Agent, Internal Revenue Service,
FIRST NATIONAL BANK OF PIKEVILLE, KENTUCKY,
CITIZENS BANK OF PIKEVILLE, KENTUCKY and
PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT.

The appellants, Taylor Justice and Stella Justice, appeal from a final judgment of the United States District Court for the Eastern District of Kentucky entered in favor of the appellees, United States of America and Glen B. Johnson, Special Agent, Internal Revenue Service, refusing to hold unconstitutional as violative of the fourth and fifth amendments

to the Constitution of the United States, Title 26 U. S. C. Sections 7602, 7603, and 7604. Appellants submit this statement of jurisdiction to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions involving the interplay of individual constitutional rights and the revenue laws of the United States of America are presented.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Kentucky has not been reported as yet but a copy of its opinion is set forth, *infra,* Appendix A, pages 19-21. A former opinion of the United States Court of Appeals for the Sixth Circuit involving the subject matter of this litigation is reported under the style "Taylor Justice and Stella Justice, Intervening Petitioners-Appellants v. United States of America and Glen B. Johnson, Special Agent, Internal Revenue Service, Petitioners-Appellees v. First National Bank of Pikeville, Citizens Bank of Pikeville, and Pikeville National Bank and Trust Company, Respondents," at 365 F. 2d 312.

JURISDICTION.

This action was initiated in the United States District Court for the Eastern District of Kentucky by the appellees, United States of America and Glen B. Johnson, Special Agent, Internal Revenue Service, under the provisions of Title 26 U. S. C., Section 7604

to judicially enforce an administrative summons issued by the appellee, Glen B. Johnson, Special Agent, Internal Revenue Service, under the provisions of Title 26 U. S. C. Section 7602 and served on the appellees, First National Bank of Pikeville, Citizens Bank of Pikeville, and Pikeville National Bank and Trust Company seeking disclosure to the appellee, Glen B. Johnson, Special Agent, Internal Revenue Service, records reflecting banking transactions between said banks and the appellants, Taylor Justice and Stella Justice. Application of the appellants, Taylor Justice and Stella Justice, to intervene was initially refused but thereafter the United States Court of Appeals for the Sixth Circuit in its reported opinion appearing at 365 F. 2d 312 directed that the appellants be permitted to intervene and assert constitutional rights. Thereafter a District Court of three judges was convened under the provisions of Title 28 U. S. C., Sections 2282 and 2284.

This appeal is prosecuted under the provisions of Title 28 U. S. C., Section 1253.

The question sought to be asserted here is not hypothetical nor is it contingent. The appellants assert that the forced production by administrative summons issued by a law enforcement agent conducting a criminal tax investigation of their income tax return is in derogation of rights secured to them by the Fourth and Fifth Amendments to the Constitution of the United States. It is asserted that Title 26 U. S. C., Sections 7602, 7603 and 7604 are unconstitutional for such reason and injunctive relief against the

judicial enforcement of the administrative summons was sought.

On June 27, 1967, the three judge court filed an opinion denying the relief sought.

Notice of Appeal from such opinion and order of the United States District Court for the Eastern District of Kentucky was thereafter filed on July 6, 1967 in the office of the Clerk of the United States District Court for the Eastern District of Kentucky.

Jurisdiction in this Court is established by the provisions of Title 28 U. S. C., Section 1253. Cases believed to sustain the jurisdiction of this Court are:

Zemel v. Rusk, 85 S. Ct. 1271, 381 U. S. 1, 14 L. Ed. 2d 179; Rehearing denied 86 S. Ct. 17, 382 U. S. 873, 15 L. Ed. 2d 114;

Radio Corporation of America v. United States, 71 S. Ct. 806, 341 U. S. 412, 95 L. Ed. 1062.

STATUTES INVOLVED.

The validity of Title 26 U. S. C., Sections 7602, 7603, and 7604 are involved and they may be found at c. 736, 68A Stat. 901, 902. The text of such sections is as follows:

"26 U. S. C., 7602 EXAMINATION OF BOOKS AND WITNESSES. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or

fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

"26 U. S. C., 7603 SERVICE OF SUMMONS. A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

"26 U. S. C., 7604 ENFORCEMENT OF SUMMONS.

"(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

"(b) Enforcement. Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

QUESTION PRESENTED.

The question presented is: Do the provisions of 26 U.S.C., Sections 7602, 7603, and 7604 purporting to authorize the Commissioner of Internal Revenue to judicially compel the production of the financial records of a taxpayer in the course of an investigation of civil and criminal liabilities for income taxes contravene the Fourth and Fifth Amendments of the Constitution of the United States?

STATEMENT OF THE CASE.

Some time in the Spring of 1964, the Internal Revenue Service (hereinafter referred to as Service), acting through its Internal Revenue Agent, Randy Smith of Pikeville, Kentucky, began a civil investigation of appellants' tax returns for the years 1960 through 1963 inclusive. With the complete cooperation of appellants, their accountants made available all of appellants' records. For an itemized list of the extent of the records, see "Ratliff, Exhibit I."

In addition to that, Internal Revenue Agent Smith had access to a Zerox-Photo-Copying machine in the accountant's office. The appellee banks were authorized to and did make available their records to Internal Revenue Agent Smith. He freely acknowledged that he had complete access to all records which he asked to see (Deps. Agent Smith, p. 31).

On or about June 29, 1965, appellee, Special Agent Glen B. Johnson, of the Intelligence Division of the Service first appeared on the scene and requested that

he be permitted to see the material previously seen by Internal Revenue Agent Smith. Attorneys for appellants advised against an accession to that request. These proceedings followed.

Both in his affidavit appended to the Complaint filed here seeking judicial enforcement of the administrative subpoenas issued to the appellee banks, and on his oral testimony Special Agent Johnson has testified that he is conducting an investigation to determine if appellants are "civilly" liable for any tax due the government. On his evidence given on deposition and at the hearing he had conceded that his investigation also encompasses the question of whether "fraud" penalties should be asserted against appellants. He refuses to differentiate, in this context, between "civil" fraud and "criminal" fraud.

Internal Revenue Agent Smith testified that, in accordance with the appropriate procedures regulating the performance of his employment, he had made what he termed a "Referral Report" to his superior officer and that, in due course, appellee, Special Agent Johnson was assigned to the case to carry out the further investigation of the appellants' tax returns. This procedure was in accordance with the provisions of MT 4562.31, Internal Revenue Manual entitled "Penalties and Fraud Procedures" (Deps. Smith, pp. 23-25, Qs. 126-137).

Appellee Johnson testified explicitly that Internal Revenue Agent Smith was no longer in charge of the investigation, and that he was solely in charge (Deps. of Johnson, pp. 38-39, Qs. and As. 13-14).

He further testified that an Internal Revenue Agent makes a referral report only in those cases where he has some reason to believe that there is fraud (Deps. of Johnson, p. 40, Q. and A. 19). It is his function to determine if fraud has been committed (Deps., Johnson, p. 40, Q. and A. 21).

On his first contact with Appellant Taylor Justice, he identified himself as Special Agent, displayed his credentials, advised him that he was not required to answer any question that he believed would tend to incriminate him and that he was entitled to have an attorney present if he chose (Deps., Johnson, pp. 43-44, Qs. 36, 37).

He testified that he was not familiar with the administrative procedures available to a taxpayer undergoing a civil investigation (Deps., Johnson, p. 45, Q. and A. 45). However, he was familiar with Regulation 601.006(g), 30 Fed. Reg. 127, which provides that upon assignment of a tax investigation to the Intelligence Division, all civil administrative procedures are suspended (Deps., Johnson, pp. 46-47, Qs. 48-49).

He conceded that he had been advised and understood that every record he sought would be supplied on his assurance that he was not conducting a criminal investigation of Appellants (Deps., Johnson, p. 48, Q. and A. 53).

He conceded that his job was to assimilate and prepare evidence for criminal prosecutions (Deps., Johnson, p. 21, Q. and A. 6).

At the hearing of this case at Lexington, Kentucky on Friday, May 12, 1967, certain official publications

of the Internal Revenue Service marked "for official use only" were supplied to the attorneys for the appellants with directions that the material not be duplicated in any way or made a part of the record (Tr. of Hearing, pp. 61-62). This material bore the identifying legend United States Treasury Department, publication No. 5155 (Rev. Oct. 1966) entitled Treasury Enforcement Agent and defined the duties of a Special Agent of the Internal Revenue Service as being that of an investigator of facts in tax fraud and other related criminal acts against the public revenue. As we were not permitted to duplicate this material, we cannot quote from it at length. Suffice it to say that for the purposes of the question presented to this Court the publication establishes without question that the appellee, Glen B. Johnson, Special Agent, could only have been interested in the issuance of the administrative summons directed to the three banks involved in this case for the purpose of determining whether the appellants were subject to criminal or civil fraud penalties. Moreover, Johnson's Exhibit 1, a deficiency tax assessment for the year 1961 discloses that a 50% civil fraud penalty has, in fact, been levied against these appellants as a result of the investigative activities of the appellee, Glen B. Johnson, Special Agent, Internal Revenue Service.

The question of whether these appellants could resist the forced production of records of banking transactions between them and the three appellee banks was raised by the intervening petition under the authority of the Opinion of this Court in Reisman,

et al. v. Caplin, et al., 84 S. Ct. 508, 375 U. S. 440, 11 L. Ed. 2d 459.

The trial court's opinion and order expressly found that: "Nor does the fact that the summons may be used to obtain information for subsequent use in a criminal proceeding, *ipso facto*, rendered the statute unconstitutional . . ." The court further held that the involved statutes were constitutional and denied the demand for a restraining order enjoining its enforcement.

At the hearing of this case, the trial Court through Judge Celebrezze defined the single issue in this case as being limited to whether the appellants had a proprietary interest in the banking records in the possession of the banks reflecting transactions with the appellants (Tr. of Hearing, pp. 38-41).

The appellants were advised that in order for them to prevail they must show that the documents subpoenaed belonged to them as stated by Judge Celebrezze: "You must show that these documents belong to your client. That is the evidence that you must produce in this Court" (Tr. of Hearing, p. 42).

THE QUESTION IS SUBSTANTIAL.

As stated above, this case involves an interplay between Fourth and Fifth Amendment rights of taxpayers and the rights vested in the Secretary of Treasury to protect the public revenue.

At the outset, we point out that the Court below viewed the Constitutional question presented as entirely dependent on appellants' proprietary interest

in banking records reflecting transactions between the appellants and the banks. Yet, the attacked sections do not, expressly or by implication, limit the right of judicially enforced administrative summonsing of documents to records in which the taxpayer has proprietary interests. The grant of authority extends to "any" documents relevant or material to any tax investigation, criminal or civil. If these actions contravene the Fourth and Fifth Amendments to the Constitution of the United States, the question of proprietary interests is completely immaterial.

There is increasing concern of the bench and bar that Constitutional rights of taxpayers are being denied in the guise of protecting public revenue.

Constitutional Rights in Criminal Tax Investigation, 53 A.B.A.J. 517;

The Taxpayer Under Fraud Investigation, 47 A.B.A.J. 265;

The Taxpayers' Rights—The Investigation of Tax Fraud Cases, 42 A.B.A.J. 325;

Burns, Searches and Seizures: The Suppression of Evidence; N.Y.U. 20th Inst. on Fed. Tax. 1081.

On page 1087 of the last article it is said:

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evi-

dence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

And see:

Russo v. U. S., 214 F. 2d 285 (2d) C.C.A.;
U. S. v. Silverstein, 214 F. 2d 789 (2d) C.C.A.

At least one Federal District Court, the Northern District of Florida, has held the pronouncement of this Court in Miranda v. Arizona, 86 S. Ct. 1602, 384 U. S. 436, 16 L. Ed. 2d 694, fully applicable in an investigation by a Special Agent of the Internal Revenue Service.

U. S. v. Kingry, CCH USTC Advance Sheets Par. 9262 (*N. D. Fla.*), *M-1948 CR*, Jan. 6, 1967.

This decision is at complete variance with such cases as:

Turner v. U. S., 222 F. 2d 926 (4th C. Ca.);
Blumberg v. U. S., 222 F. 2d 496 (5th C. Ca.);
Scanton v. U. S., 223 F. 2d 382 (1st C. Ca.);
U. S. v. Achilli, 234 F. 2d 797 (7th C. Ca.).

The provisions of Title 26 U.S.C. 7602, 7603, and 7604 purport to grant express authority to the Secretary of Treasury or his delegate ". . . for the purpose of ascertaining the correctness of any return

. . .'' the right to require a taxpayer to: (1) permit the examination of ''any'' books, papers, records, or other data deemed relevant or material to the inquiry; (2) to summon the taxpayer or any other person having possession, custody, or care of any records relating to the business of the taxpayer and require the production of such records and the giving of testimony under oath with respect to such inquiry; and (3) to place the taxpayer under oath and require him to testify. When such summons are served resort may be had to the district courts of the United States for judicial enforcement of this sweeping grant of power.

It is axiomatic that every civil or criminal fraud penalty imposed with respect to income taxes depends on the ''correctness'' of the tax return of the taxpayer. These sections of the Internal Revenue Code without question purport to make it the duty of a taxpayer to convict himself out of his own mouth and with his own records if his tax returns are incorrect. While the Internal Revenue Code is designed to finance the necessary operations of government, criminal sanctions are an integral part of the tax structure provided.

Tit. 26 §§ 7201, *et seq.*

Civil penalties are provided as well.

Tit. 26 § 6653(b).

The provisions of the Internal Revenue Code here involved are founded on the thesis that one defrauding the public revenue should be made to convict himself

of that offense. In the context here presented the teaching of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 and Miranda v. Arizona; *supra,* applies with force.

The wholesale abuses of the rights vested in the Internal Revenue Service, abuses achieved at substantial costs to individual constitutional rights have been the subject of a continuing Congressional investigation and a matter of public concern in the public press. (See August, 1967 edition of *Readers' Digest,* pp. 42-49.)

The lower court held, however, that the only issue presented by appellants' intervening complaint was whether they had sufficient property interest in the records of banking transactions and the appellee banks as to entitle them to assert their constitutional rights.

At the outset, constitutional rights are not to be deemed within the traditional concepts of "property rights."

> Jones v. U. S., 80 S. Ct. 725, 362 U. S. 257, 4 L. Ed. 2d 697.

If dependent on the question of proprietary right, however, there is judicial authority supporting their property rights in these bank records.

> Brex v. Smith, 146 Atl. 34, 36;
> Peterson v. Idaho, First National Bank, 83 Idaho 578, 367 Pacific 2d 284, 92 ALR 2d 891;
> Zimmermann, et al. v. Wilson, 81 F. 2d 847, 105 F. 2d 583.

The initial opinion in the Zimmermann case, *supra*, held banking and brokerage records as privileged from government inspection. On the second appeal, the earlier opinion was withdrawn with respect to brokerage records, but the first opinion was not modified with respect to banking records except to hold that banks had no standing to make objections, that right being the personal right of the depositor.

A special agent is charged with enforcing the criminal law and none of his duties involve an investigation as to civil liabilities as to taxes. Of course, in any tax evasion matter, there would be civil liability for taxes but it is nothing more than a play on words to assert, as did the government below, that he was making an investigation as to civil liability for taxes. The publications of the department establish that his sole function is that of assimilating and preparing evidence for criminal prosecutions.

U. S. Treasury Department Publication No. 5155 (Rev. Oct., 1966);

U. S. Treasury Department Publication G. S. 1811-111 (Special Agent) SPD. No. 334, July 3, 1962.

These internal documents of the Internal Revenue Service were supplied to the attorneys for the appellant at the hearing before the trial court. We were ordered not to duplicate these publications and the trial court declined to consider them for any purpose on the issues asserted by appellants. These documents were marked "for official use only." We cannot, therefore, quote from this material. Obviously,

under Public Law 90-23 81 Stat. 54 amending Title 5 U.S.C. § 552, this material should be available to the Court.

This material, as well as Reg. 1118.6 of the Service, 30 Fed. Reg. 9499-9400, must convince any objective mind that the appellee, Glen B. Johnson, is engaged in a criminal investigation of these appellants and that in that investigation he is using the grant of power under Title 26 §§ 7602, 7603, and 7604 in furtherance of that objective.

CONCLUSION.

The question here presented is substantial. It involves, perhaps, a balancing of individual constitutional rights and the public importance. In essence, it requires a pronouncement of this court as to whether such individual rights can be sacrificed in the guise of protecting the public revenue. No Court, including this one, has passed on the constitutionality of Title 26 U.S.C. §§ 7602, 7603, and 7604. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

No. 1061

UNITED STATES OF AMERICA and
GLEN B. JOHNSON, Special Agent, Internal
Revenue Service, - - - - - - - - *Plaintiffs,*

v.

FIRST NATIONAL BANK OF PIKEVILLE,
CITIZENS BANK OF PIKEVILLE and
PIKEVILLE NATIONAL BANK & TRUST CO., - *Defendants.*

OPINION AND ORDER—Filed June 27, 1967.

This action arises from efforts of the United States to examine certain bank records of various banks in Pikeville, Kentucky, in connection with an examination conducted by the Internal Revenue Service relative to the income tax liability of Taylor Justice and Stella Justice, for the years 1960-1963, inclusive.

In *Justice* v. *United States,* 365 F. 2d 312, the Court of Appeals for the Sixth Circuit directed the filing of the Intervening Petition of the taxpayers.

In paragraph eighteen of the Intervening Complaint, the petitioners have challenged the constitutionality of Title 26 U.S.C., Sections 7604(a) and (b) and have demanded a restraining order, enjoining and restraining the enforcement of the summons issued herein pursuant to said statutory provision.

The undersigned Three Judge District Court was designated, pursuant to 25 U.S.C. 2284, to hear and

determine the issue raised and proceeded on May 12, 1967, to hear the same.

The entire thrust of petitioners' argument is that the efforts of the United States are directed toward securing evidence to be used against the petitioners in a criminal proceeding and therefore the instant statutory proceeding is violative of the constitutional safeguards provided by the Fourth and Fifth Amendments.

An examination of the record fails to support the petitioners' charge that the real purpose of this proceeding is to secure information for use in a criminal action. Glen B. Johnson, the special agent conducting the investigation, testified on discovery that the purpose of the investigation was "to determine the accuracy of the income tax returns of the taxpayers." (See deposition of Glen B. Johnson, Special Agent, Question 49 and answer, page 3.) This testimony appears to bring the case squarely within the ambit of *Wild* v. *United States,* 362 F. 2d 206, wherein 26 U.S.C. 7602 was held immune from challenge under the Fourth and Fifth Amendments.

The Supreme Court has impliedly recognized the constitutionality of this section in *Reisman* v. *Caplin,* 375 U. S. 440, wherein the Court stated:

> "The petitioners make no claim that this provision suffers any constitutional infirmity on its face."

Certainly if the enabling statute is not subject to unconstitutional infirmity, greater logic would clearly indicate that no such attack could be made on the enforcement provision of 26 U.S.C. 7604.

Nor does the fact that the summons may be used to obtain information for subsequent use in a criminal proceeding, ipso facto, render the statute unconstitutional.

This conclusion is clearly recognized in *Reisman* v. *Caplin, supra:*

"There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims."

We find the statute under attack is constitutional and the demand for a restraining order enjoining the enforcement of the summons issued thereunder is denied.

This the 27 day of June, 1967.

/s/ Anthony J. Celebrezze, Judge
United States Court of Appeals
for the Sixth Circuit.

/s/ Mac Swinford, Chief Judge
United States District Court,
Eastern District of Kentucky.

/s/ Bernard T. Moynahan, Jr., Judge
United States District Court,
Eastern District of Kentucky.

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Mary F. Blalock, D. C.

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 570

TAYLOR JUSTICE AND STELLA JUSTICE, APPELLANTS

v.

UNITED STATES OF AMERICA; GLEN B. JOHNSON, SPECIAL AGENT, INTERNAL REVENUE SERVICE; FIRST NATIONAL BANK OF PIKEVILLE, KENTUCKY; CITIZENS BANK OF PIKEVILLE, KENTUCKY; and PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

The Solicitor General, on behalf of the United States of America and Glen B. Johnson, a Special Agent of the Internal Revenue Service, moves the Court to affirm the judgment of the district court.

STATEMENT

This action was initiated in the United States District Court for the Eastern District of Kentucky by appellees United States of America and Glen B. Johnson, Special Agent, Internal Revenue Service, under the provisions of 26 U.S.C. 7604 to enforce judicially administrative summonses that Agent Johnson had issued under the provisions of 26 U.S.C. 7602 and served on the three appellee banks, seeking disclosure of records belonging to the banks and reflecting banking transactions between them and appellants.[1] The application of the appellants to intervene in the enforcement proceedings was initially denied but thereafter the Sixth Circuit directed that the appellants be permitted to intervene. *Justice* v. *United States*, 365 F. 2d 312. (J.S. 2-3.)

In paragraph eighteen of the Intervening Complaint, appellants challenged the constitutionality of 26 U.S.C. 7604(a) and (b) and demanded a restraining order to enjoin the enforcement of the summonses (J.S. 19). Pursuant to 28 U.S.C. 2282 and 2284, a three-judge district court was convened to hear and determine the constitutional issue (J.S. 19-20). Appellants urged that the government's efforts were directed toward securing evidence to be used against

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[1] The records sought were bank statements, bank ledger sheets, deposit tickets, any microfilm that would show any canceled checks which cleared through appellants' bank account, cashier's checks, certified checks, and note ledger sheets (Hearing of May 12, 1967, p. 42). All of these records were in the possession of the banks (id., p. 47).

them in a criminal proceeding and that therefore the proceeding violated their constitutional rights under the Fourth and Fifth Amendments (J.S. 20). The three-judge court found this argument to be without merit, held the statute constitutional, and denied the request for an injunction (J.S. 21).

ARGUMENT

Section 7602 of the Internal Revenue Code of 1954 allows the use of summonses such as the ones issued here "[f]or the purpose of ascertaining the correctness of any return" and other specified purposes. Petitioner reasserts here what was his principal contention below—that the summonses issued in this case were not for such purposes but were in reality solely for use in a criminal investigation. There is no evidence to support this charge. Johnson's testimony, which the court below accepted (J.S. 20), was that the purpose of the investigation was "to determine the accuracy of the income tax returns of the taxpayers." This Court has said, "If a taxpayer has filed fraudulent returns, a tax liability exists * * *. Section 7602 authorizes the Commissioner to investigate any such liability." *United States* v. *Powell*, 379 U.S. 48, 53. The mere fact that the information thus obtained may eventually be used in criminal, as well as civil, proceedings does not affect the validity of the summons. *Wild* v. *United States*, 362 F. 2d 206, 209 (C.A. 9); *Boren* v. *Tucker*, 239 F. 2d 767, 772-773 (C.A. 9); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16

(C.A. 2), certiorari denied, 373 U.S. 902; *Tillotson* v. *Boughner*, 333 F. 2d 515, 516-517 (C.A. 7), certiorari denied, 379 U.S. 913; *Wright* v. *Detwiler*, 345 F. 2d 1012 (C.A. 3), affirming *per curiam* 241 F. Supp. 753 (W.D. Penna.).

Appellants' other claim is that their privilege against self-incrimination gave them a right to have the summonses quashed. But the papers and effects which the Fifth Amendment privilege protects are the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *United States* v. *White*, 322 U.S. 694, 699. A taxpayer has no rights or privileges with respect to records belonging to a third party reflecting transactions of the taxpayer. *DeMasters* v. *Arend*, 313 F. 2d 79, 85 (fn. 11) (C.A. 9), petition for certiorari dismissed, 375 U.S. 936; *Application of Cole*, 342 F. 2d 5, 7-8 (C.A. 2), certiorari denied, 381 U.S. 950; *Zimmerman* v. *Wilson*, 105 F. 2d 583, 586 (C.A. 3); cf. *Schulze* v. *Rayunec*, 350 F. 2d 666, 668 (C.A. 7); certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919.

None of appellants' records were sought. The only records sought by the summonses are those belonging to, and in the possession of, the banks. The court below invited appellants to demonstrate their property interest in the documents that the summonses demanded (J.S. 15). But no such proof was adduced.

The cases relied upon by appellants (J.S. 15-16) for the proposition that they have proprietary rights in the banks' records do not aid them. *Brex* v. *Smith*,

146 Atl. 34, a case from a lower New Jersey court, simply holds that a bank should not disclose certain records to a prosecutor until ordered to do so by a court of competent jurisdiction. In *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284, the court allowed a suit for damages based on a bank's alleged disclosure, unauthorized by the depositor or "by law," of a depositor's transactions to a third party—the depositor's employer. *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C.A. 3), involved the records of a broker reflecting a client's transactions; the court of appeals held that the client was not entitled to invoke the protection of the Fourth Amendment. See 105 F. 2d at 586.

No substantial question is presented and the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1967.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 670

TAYLOR JUSTICE and
STELLA JUSTICE, Appellants,

v.

UNITED STATES OF AMERICA,
ELMO H. JOHNSON, Special Agent,
Internal Revenue Service,
FIRST NATIONAL BANK OF PIKE-
VILLE, KENTUCKY,
CITIZENS BANK OF PIKEVILLE,
KENTUCKY, and
PIKEVILLE NATIONAL BANK AND
TRUST COMPANY, INC., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 570

TAYLOR JUSTICE and
STELLA JUSTICE, - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA;
GLEN B. JOHNSON, Special Agent, Internal Revenue Service;
FIRST NATIONAL BANK OF PIKEVILLE KENTUCKY;
CITIZENS BANK OF PIKEVILLE, KENTUCKY; and
PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC., - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM.

Taylor Justice and Stella Justice, your appellants, respectfully state that they oppose the motion to affirm filed by the Solicitor General on behalf of the United States of America and Glen B. Johnson, a Special Agent of the Internal Revenue Service.

ARGUMENT.

The basis of the motion to affirm filed by the Solicitor General is that no substantial question is presented on this appeal.

We would most respectfully call to the Court's attention Pages 11 through 17 of our Jurisdictional Statement filed in this case. In addition, however, we would like to point out that the lower federal courts are having difficulty in applying recent pronouncements of this Court dealing with constitutional rights. In those situations prosecutions for tax evasion are instituted after a routine civil audit where the provisions of Title 18 U.S.C. Sections 7602, 7603 and 7604 have been utilized. In our Jurisdictional Statement we referred to the case of U. S. v. Kingry, CCH USTC Advance Sheets Par. 9262 (N. D. Fla.), M-1948 CR, Jan. 6, 1967.

Since the filing of our Jurisdictional Statement in this case, three federal courts have had occasion to speak relevant to the issues presented by this case.

Although not dealing precisely with a tax investigation, the case of U. S. of America, ex rel. Frank DeForte v. Mancusi, etc., 379 F. 2d 897 (2CCA), is the latest pronouncement of a federal court on the issue of standing as applied to the facts of this case. There the Second Circuit Court of Appeals reversed the district court for the Western District of New York's denial of a petition for writ of habeas corpus on the ground that the petitioner lacked standing to object to the introduction against him at a state trial of evidence alleged to be the fruit of an illegal search and

seizure. The court held that the petitioner, a union officer, who was convicted in a state court of conspiracy, coercion and extortion, had standing to challenge evidence introduced at trial, which consisted of various union books and records which were admittedly illegally seized by state officials from the union's office while the union officer was present. The court's decision there was bottomed, basically, on this court's pronouncement in the case of Jones v. United States, 362 U. S. 257. We do not believe that extensive quotations from this opinion is either necessary or desirable in this brief. We would take the liberty of quoting from the latter portion of the opinion in which the Second Circuit said:

> "We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mechanical and unreflective application of new or old formulations, and neglect of the differences between cases leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have not concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have not held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were 'directed' at appellant, and that his right of privacy was invaded by the unwarranted action of

the state officials. In these circumstances we can discern no legitimate reason for denying DeForte standing."

The district court for the Northern District of Illinois has applied this court's decision in Miranda v. Arizona, 384 U. S. 436, to tax payers under investigation for taxes. U. S. v. Turzynski, 268 F. Supp. 847, and in this connection see "Fifth Amendment Right to Counsel in Federal Income Tax Investigations," 19 Stan. L. Rev. 1014.

The clearest call for a pronouncement by this Court on these matters is that of the Sixth Circuit Court of Appeals in U. S. v. Maius, 378 F. 2d 716. That court said:

> "With regard to the contention that statements made by appellant to the Internal Revenue agents were improperly admitted in evidence, when the agent, who had advised him of his rights under the Fifth Amendment, did not inform him that he could have an attorney present during the interview, we find no error. Appellant was not under arrest or under duress in the legal sense of the term when he made the statements in question. A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him, and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison, and to use this evidence to send him to prison. It

would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. The Internal Revenue Service has lately been subjected to widespread criticism, because of trickery of some of its agents in unconstitutional invasion of a citizen's rights by the use of tapped telephone wires, or 'bugging'; and the Commissioner has repudiated and castigated such conduct. No one would believe, however, that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, no court has held that a man who is not advised of his right to have his attorney present when questioned by an Internal Revenue agent is thereby deprived of his constitutional rights. A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. *Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.*" (Emphasis ours.)

CONCLUSION.

Some restraints must be imposed on the willingness of the Internal Revenue Service to sacrifice the constitutional rights of tax payers in the name of collecting public revenue. The willingness of the govern-

ment here in this very case to use the pretext that it is solely concerned with civil liability for taxes in the face of the admitted fact that it is using a criminal law enforcement officer to conduct the investigation is, in itself, the best evidence that this Court should speak definitively on the issues implicit in this appeal. It is neither good morality nor good law for the government to maintain the fiction of a civil determination as to possible taxes due while, at the same time, using a criminal law enforcement officer in the investigation.

In any event, the questions presented are substantial and require action by this court. These questions are of increasing concern to the lower courts and this Court itself is being increasingly burdened by applications for review of pronouncements of lower courts on these subjects. We respectfully submit that an expression of authoritative opinion by this Court will be of great value to the lower courts in adjusting the interplay between constitutional rights and the rights of the government to protect the public revenue.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

JUSTICE ET UX. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 570. Decided March 4, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.